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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 MICHAEL A BURNHART,

11 Plaintiff,

12 v.

13 DET. JIM MARAI *et al.*,

14 Defendants.

15 Case No. C06-5643 FDB

16 ORDER ADOPTING
17 REPORT AND
18 RECOMMENDATION

19 The Magistrate Judge recommends that this civil rights complaint be dismissed prior to
20 service for failure to state a claim. As detailed by the Magistrate Judge, Plaintiff's claim for relief
21 necessarily implies the invalidity of a criminal judgment and must be brought as a petition for a writ
22 of habeas corpus, and not as a 42 U.S.C. § 1983 action. See, Butterfield v. Bail, 120 F.3d 1023 (9th
23 Cir. 1997).

24 Petitioner has not filed a formal objection to the Report and Recommendation. Instead,
25 Petitioner has filed a "Motion to Dismiss with ability to pursue at a later date." Because this matter
26 will be dismissed without prejudice, Plaintiff's motion is unnecessary and moot.

27 The Court, having reviewed, the Report and Recommendation of Magistrate Judge J. Kelley
28 Arnold, and the remaining record, does hereby find and ORDER:

- 29 (1) The Court adopts the Report and Recommendation.
- 30 (2) The Complaint [Dkt #5] is **DISMISSED WITHOUT PREJUDICE**
31 for failure to state a claim. This action must proceed in habeas corpus
32 as it calls into question a criminal conviction.

- 1 (3) Plaintiff's Motion to dismiss [Dkt. #7] is denied as **MOOT**.
2 (4) The Clerk is directed to send copies of this Order to plaintiff, and to the Hon. J.
3 Kelley Arnold.

4 DATED this 3rd day of January, 2007.

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10 FRANKLIN D. BURGESS
11 UNITED STATES DISTRICT JUDGE
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